Hu Yu Kamg v Majlis Perbandaran Seberang Perai

APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/SP/31 OF 2010
YEO YANG POH CH, AMIRUDDIN FAWZI BAHAUDIN AND SAN GANAPHATI
20 SEPTEMBER 2012

Local Government — Town and country planning — Application for planning permission — Appeal against refusal of planning permission — Appellant's application for planning permission for three storey building designed for swiftlets rejected — Rejection solely due to objection by certain departments — Whether adequate explanation given for refusal of planning permission — Similar planning permissions previously given in same area — Whether appellant commencing activity without planning permission not a ground to reject planning permission

Local Government — Town and country planning — Application for planning permission — Hearing — Procedure — Burden of proof — Appellant raising prima facie sound and sustainable ground of appeal — Burden of proof shifts to planning authority to show good rationale for refusal of planning permission

The appellant was a co-owner of an agricultural land for padi cultivation land ('the land') situated in an area referred to as 'kawasan jelapang padi'. However, it is not within areas *gazetted* as kawasan warta tali air. The appellant wanted to supplement his *padi* cultivation on the land with swiftlet farming. Hence, the appellant applied for planning permission or kebenaran merancang ('the KM application') to have a three storey building designed for swiftlets ('the swiftlet house') on a small portion of the land which was unsuitable for padi cultivation. The respondent rejected the KM application on the sole ground that the Jabatan Pengaliran dan Saliran ('JPS') and the Jabatan Perancang Bandar dan Desa ('JPBD') did not support the application, as the site was in an area of active and productive padi cultivation within 'kawasan jelapang padi'. The respondent also contended that the structure plan disallowed swiftlet farming in kawasan jelapang padi, and that therefore s 22(4) of the Town and Country Planning Act 1976 ('the Act') cames into play, compelling the respondent to reject the KM application. However, at least three approvals had been granted by the respondent for similar planning applications in the same area, and at about the same period of time. The appellant therefore complained that he had been unequally treated.

Held, allowing the appeal and directing the respondent to grant the relevant planning permission to the appellant:

(1) Whenever a planning application is rejected because of lack of support

from a relevant department, the mere fact of that lack of support (without adequate explanation) will of course not per se satisfy the board that the rejection was right and proper, unless the rationale is so self evident that no elaboration is necessary. When an appellant manages to raise a ground of appeal that is prima facie sound and sustainable, it will then be for the planning authority (the respondent) to satisfy the board that there is good rationale for the objection raised by the objecting department (and hence the refusal of planning permission). The appellant here had laid out a prima facie case (see para 5).

(2) The conclusion that could be drawn from the *Ketua Penolong Pengarah Kanan Jabatan Veterinar* ('RW1')'s testimonies was that swiftlet farming has no adverse effect on *padi* cultivation, or on irrigation (see para 11).

(3) It could not be said that the structure plan prohibited swiftlet farming in 'kawasan jelapang padi', 'kawasan warta tali air' and/or 'kawasan pengairan'. Section 22(4) of the Act did not apply (see para 14).

(4) The *Garis Panduan Pembangunan Industri Burung Walit Bersepadu* ('1GP') does not prohibit swiftlet farming in kawasan jelapang padi or in kawasan warta tali air (see para 17).

(5) Applicants for the same kind of planning permissions in the same area must, in the absence of valid distinguishing factors, be treated equally by the planning authority; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 (referred) (see paras 30–31).

(6) Although the appellant had commenced his activity without prior planning permission, that was obviously something that could invite its own consequences or penalties under the Act. But it did not prevent an applicant from seeking to regularise his undertaking by applying for the required planning permission. Whether or not planning permission ought to be granted would be determined by carefully considering all relevant planning matters in relation to the facts and circumstances of a particular case. An applicant's breach (in operating before obtaining permission) will not per se disqualify him from applying for and (where appropriate) obtaining a planning permission; although there may be cases where the fact of that breach could properly become one of the factors to be taken into consideration by the planning authority when deciding on the application (see para 33).

[Bahasa Malaysia summary

Perayu merupakan pemilik bersama tanah pertanian untuk tanah perusahaan padi ('tanah tersebut') yang terletak di kawasan yang dikenali 'kawasan jelapang padi'. Walau bagaimanapun, ia bukan di kawasan yang *diwartakan* sebagai kawasan warta tali air. Perayu ingin menambah perusahaan padinya di

atas tanah tersebut dengan penternakan burung walit. Justeru, perayu memohon untuk kebenaran merancang ('permohonan KM') untuk bangunan tiga tingkat direka untuk burung walit ('rumah burung walit') di atas bahagian tanah kecil yang tidak bersesuaian untuk perusahaan padi. Responden menolak permohonan KM hanya atas dasar bahawa Jabatan Pengaliran dan Saliran ('JPS') dan Jabatan Perancangan Bandar dan Desa ('JPBD') tidak menyokong permohonan, memandangkan tapak tersebut berada di kawasan pembangunan padi yang aktif dan produktif dalam lingkungan kawasan jelapang padi. Responden juga berhujah bahawa pelan struktur tidak membenarkan penternakan burung walit di dalam kawasan jelapang padi, dan oleh itu s 22(4) Perancangan Bandar dan Desa 1976 ('Akta tersebut') digunapakai, mendesak responden untuk menolak permohonan KM. Walau bagaimanapun, lebih kurang tiga kebenaran telah dibenarkan oleh responden untuk permohonan perancangan yang sama di kawasan yang sama, dan pada tempoh masa yang sama. Perayu oleh itu mengadu bahawa dia telah dilayan dengan tidak adil.

Diputuskan, membenarkan rayuan dan mengarahkan responden untuk membenarkan kebenaran merancang yang relevan kepada perayu:

(1) Apabila permohonan merancang ditolak disebabkan kekurangan sokongan daripada jabatan yang relevan, fakta kekurangan sokongan (tanpa penjelasan yang mencukupi) sudah semestinya secara tersendirinya meyakinkan lembaga bahawa penolakan adalah betul dan wajar, melainkan rasionalnya adalah sangat jelas sehingga penjelasan adalah tidak perlu. Apabila perayu berjaya untuk menimbulkan alasan rayuan yang mana secara prima facie adalah kukuh dan boleh diterima, pihak berkuasa merancang (responden) harus meyakinkan lembaga bahawa terdapat rasional yang wajar untuk bantahan yang ditimbulkan oleh jabatan yang membantah (dan selanjutnya penolakan kebenaran merancang). Perayu di sini telah mengemukakan kes prima facie (lihat perenggan 5).

(2) Kesimpulan yang dapat dibuat daripada kenyataan Ketua Penolong Pengarah Kanan Jabatan Veterinar ('RW1') adalah bahawa penternakan burung walit tidak mempunyai efek yang buruk terhadap perusahaan padi, atau pada pengairan (lihat perenggan 11).

(3) Tidak boleh dikatakan bahawa pelan struktur melarang penternakan burung walit di dalam kawasan jelapang padi, kawasan warta tali air dan/atau kawasan pengairan. Seksyen 22(4) Akta tidak boleh digunapakai (lihat perenggan 14).

(4) Garis Panduan Pembangunan Industri Burung Walit Bersepadu ('1GP') tidak melarang penternakan burung walit di dalam kawasan jelapang padi atau di dalam kawasan warta tali air (lihat perenggan 17).

(5) Pemohon-pemohon untuk kebenaran merancang yang sama jenis di kawasan yang sama hendaklah, dalam ketiadaan faktor-faktor membezakan yang sah, dilayan dengan saksama oleh pihak berkuasa merancang (lihat perenggan); *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 dirujuk (lihat perenggan 30–31).

(6) Meskipun perayu telah memulakan aktivitinya tanpa kebenaran merancang, itu adalah sesuatu yang dengan jelas boleh mengundang akibat tersendiri atau penalti di bawah Akta. Tetapi ia tidak menghalang pemohon daripada memohon untuk merombak akujanjinya dengan memohon untuk kebenaran merancang yang diperlukan. Sama ada atau tidak kebenaran merancang harus diberikan hendaklah ditentukan dengan mempertimbangkan kesemua perkara perancangan yang relevan dengan berhati-hati berkaitan dengan fakta-fakta dan keadaan sesuatu kes. Percanggahan pemohon (dengan memulakan operasi tanpa mendapatkan kebenaran) tidak akan secara tersendirinya menyebabkan beliau tidak layak untuk memohon untuk dan (apabila bersesuaian) mendapatkan kebenaran merancang; meskipun terdapat kes di mana fakta perlanggaran tersebut boleh dengan wajar menjadi salah satu faktor untuk dipertimbangkan oleh pihak berkuasa merancang apabila memutuskan permohonan (lihat perenggan 33).]

Notes

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

Cases referred to

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Legislation referred to

Town and Country Planning Act 1976 s 22(4)

LC Tan for the appellant.
Mansur Hashim (Fuad and Rosnada with him) for the respondent.

Yeo Yang Poh Ch:

[1] This case concerns the swiftlet industry, which seems to have acquired some measure of popularity in Malaysia over the recent years, fuelled no doubt by increasing demand and higher prices for bird nests in some Asian countries.

[2] Apart from this case, there are more than a dozen other appeals pending

before this board, that pertain to circumstances that are very similar (though not necessarily in each case identical). The hearing of those cases has been put on hold, pending the outcome of this case, which has in a way become a 'test case'.

[3] The hearing of this appeal was conducted over several occasions, and has taken longer than anticipated, largely because at the earlier hearings it became apparent that the respondent, if it wished to counter the appellant's arguments, needed to adduce technical and expert evidence. Continuations of hearing were granted, more than once, in order to give the respondent opportunities to adduce evidence by the calling of witnesses, for which the respondent had recorded its appreciation, and duly proceeded to do.

THE RELEVANT FACTS

[4] The salient facts of this case are simple and undisputed. They are as follows:

(a) the appellant is a co-owner of the land held under Lot 2136, Mukim 2, Jalan Guar Kepah, Kepala Batas, Seberang Perai Utara ('the land'), measuring about 8 acres. the land is an agricultural land for padi cultivation, situated in an area referred to as 'kawasan jelapang padi Skim pengaliran Sungai Muda' ('kawasan jelapang padi'). However, it is not within areas *gazetted* as 'kawasan warta tali air': see para 4 on p 4 of the *rekod rayuan* ('RR'), which the respondent has not denied. Nevertheless, the respondent says that the land is within a 'kawasan pengairan', though evidence to this effect is scanty, and the meaning or implications of being in a 'kawasan pengairan' (and its presumed difference from a 'kawasan warta tali air') have also not been explained with any clarity;

(b) the appellant wants to supplement his *padi* cultivation on the land with what (for ease of reference) I will call 'swiftlet farming' (with a caveat that this phrase does not fully reflect theprecise nature of that activity, which will be explained later). Hence, in June 2010 the appellant applied for planning permission or *kebenaran merancang* ('KM') to have a 3 storey building designed for swiftlets ('the swiftlet house') on a small portion of the land (occupying an area of about 2000–3000 sqft), at one corner of the land. That portion is not cultivated with *padi*, and has for many (more than 50) years not been cultivated with *padi*. The appellant says that that portion is on high land, and thus is unsuitable for padi cultivation. I shall refer to the appellant's said application for planning permission as 'the KM application'; and

(c) on 18 October 2010 the respondent rejected the KM application, on the sole ground that the Jabatan Pengaliran dan Saliran ('JPS') and the Jabatan Perancang Bandar dan Desa ('JPBD') did not support the

application, as the site is in an area of active and productive *padi* cultivation, and the land is situated within *kawasan jelapang padi*. The precise wording of this sole ground is found on p 2 of the RR. The appellant appeals to this board.

INQUIRING INTO THE GROUNDS OF REJECTION OF A PLANNING PERMISSION

[5] It is obvious that, whenever a planning application is rejected because of lack of support from a relevant department, and the planning applicant then appeals to this board, the mere fact of that lack of support (without adequate explanation) will of course not per se satisfy the board that the rejection was right and proper, unless the rationale is so self-evident that no elaboration is necessary. In the vast majority of cases, if and when an appellant manages to raise a ground of appeal that is prima facie sound and sustainable, it will then be for the planning authority (the respondent) to satisfy the board that there is good rationale for the objection raised by the objecting department (and hence the refusal of planning permission). It is incumbent on this board to inquire into the reasons for the refusal of a planning permission, once an appellant has made out a prima facie case.

THE APPELLANT'S PRIMA FACIE CASE

[6] In this appeal, the appellant had laid out a prima facie case, when he brought to the board's attention the following matters:

(a) the nature of swiftlet farming is much closer and akin to agriculture (than to residential, commercial or industrial undertakings). It is generally permissible on agricultural land, which would include *padi* lands;

(b) what the respondent contends is that, while swiftlet farming is generally permissible on a *padi* (agricultural) land, it is not allowed on *padi* land that is located within *kawasan jelapang padi* and/or within *kawasan warta tali air*. In response, the appellant submits that such policy, if there is one, must be supported by sound reasons, into which the board is urged to investigate; and

(c) the appellant further points out that, while the respondent has refused him planning permission on the ground that the site is located within *kawasan jelapang padi*, at least three other planning permissions had been granted by the same respondent (around the same period of time, ie in or around 2010) to others within the vicinity of the appellant's site, for lands that are likewise situated within the same *kawasan jelapang padi* (see the bundle of documents marked 'A'). These three successful planning

applications are in respect of Lots 2564, 1631 and 2139, whose geographical positions relative to the appellant's site can be seen from the document (plan) marked 'F' (which is not disputed by the respondent). These lots are indeed nearby. It is no wonder that the appellant is dissatisfied with the different treatment that he receives.

[7] Three broad questions cry out for answers:

(a) does swiftlet farming adversely affect *padi* cultivation and/or irrigation?

(b) if swiftlet farming is generally permissible on *padi* lands, but *kawasan jelapang padi* and *kawasan warta tali air* are exceptions, are there good reasons for these exceptions? and

(c) if there are good reasons why swiftlet farming is not allowed in *kawasan jelapang padi* and/or *kawasan warta tali air*, why then have those three planning permissions been granted in the same area and in about the same period of time as the appellant's application? Can this differential treatment be justified?.

IS SWIFTLET FARMING INCOMPATIBLE WITH *PADI* CULTIVATION?

[8] If it is shown that swiftlet farming is incompatible with *padi* cultivation, eg if it adversely affects the planting or harvest of *padi*, or its irrigation, then that will be a very good reason to prohibit the activity in areas of padi cultivation. The respondent called Dr Mohd Noor Hisham ('RW1'), the *Ketua Penolong Pengarah Kanan di Jabatan* Veterinar, to assist the board to look into this issue.

[9] I found RW1 to be a very knowledgeable and credible witness. He testified in a most professional manner, giving direct and helpful answers based on his expert knowledge, and not letting his personal preferences (which he no doubt had, and was entitled to have) affect the logic of his answers. The board records its appreciation for his lucid testimonies.

[10] The following have emerged from RW1's testimonies:

(a) swiftlets are not domesticated or in captivity. Swiftlet farming is carried out merely by way of providing a suitable structure (house) that will attract swiftlets to build their nests there and to rest there at night. During the day, swiftlets roam freely within an area of roughly 50km radius. In this sense, RW1 has described swiftlet farming as eco-friendly, since it does not seek to alter the natural environment;

(b) there are guidelines for good husbandry, to keep swiftlet houses in sanitary conditions. However, if good husbandry practices are not followed, the resulting adverse consequences are not so much to the *padi* environment, as to the swiftlet operator concerned (his health), and to his produce (eg the quality of the bird nests will drop, and predators such as snakes and rats will thrive);

(c) swiftlet's excrement is very tiny compared with those of chickens, ducks, goats, cows and pigs. The effect of guano getting into the irrigation system is minimal. Further, it is unlikely that guano might be carelessly discarded into the irrigation system, because they can be sold at a good price. If guano finds its way into padi fields, it will act as a fertiliser, and will have no negative effect;

(d) swiftlets are not migratory birds, and so they pose no danger to health, in terms of avian influenza and the like. Swiftlets are not known to cause any significant health problem, even to workers who enter swiftlet houses daily;

(e) swiftlets are not harmful to crops, including *padi*; and

(f) complaints from neighbours of swiftlet operators are usually about the noise ('clicking sounds') made by swiftlets in the mornings and the evenings; and at times about the noise of 'bird calls' used by the operator. Bird calls can and should be restricted to the hours of 7–10am and 5–8pm, using a timer.

[11] The conclusion that may be drawn from RW1's testimonies is that swiftlet farming has no adverse effect on *padi* cultivation, or on irrigation. This explains why neither the Department of Environment nor the Veterinary Department had objected to the KM application. We must now examine why the JPS and the Department of Agriculture have objections to it.

DOES THE STRUCTURE PLAN PROHIBIT SWIFTLET FARMING IN *KAWASAN JELAPANG PADI* OR *KAWASAN WARTA TALI AIR*?

[12] The respondent contends that the *structure plan* disallows swiftlet farming in *kawasan jelapang padi*, and that therefore s 22(4) of the Town and Country Planning Act 1976 ('the Act') comes into play, compelling the respondent to reject the KM application (even though this was not stated as a reason in the respondent's rejection — see p 2 of the RR).

[13] Extracts of the relevant provisions in the structure plan have been produced by both the respondent (see the bundle marked 'D') and the appellant (see the bundle marked 'J'). The following are of relevance:

(a) in the structure plan, *kawasan jelapang padi* are considered *kawasan*

sensitif alam sekitar ('KSAS'). *Kawasan jelapang padi* that are productive are considered 'KSAS sumber makanan' — see the two columns under the heading 'Pemodenan Sektor Pertanian' on p 2 of the bundle marked 'D' (Part 2–8 of the structure plan);

(b) but the use of terms is not uniform or consistent. Under DSU10, *kawasan jelapang padi* is also called 'KSAS Sokongan Hidup';

(c) in DSU10 L2, it is expressly and specifically stipulated that no development whatsoever is permitted in 'Kawasan KSAS berisiko bencana'. But no similar stipulation is made in relation to *kawasan jelapang padi*, *kawasan warta tali air*, or *kawasan pengairan*;

(d) DSU11 bears the heading 'Aktiviti Terpilih dan Terkawal akan hanya dibenarkan di KSAS Sokongan Hidup'. DSU11 L1 provides that selected and regulated activities can be considered within KSAS *sokongan hidup*, without explaining what these activities might be. However, it does show that an absolute prohibition is not intended in relation to KSAS *sokongan hidup* (which includes *kawasan jelapang padi*); and

(e) DS23 is entitled 'Menggalakkan Perusahaan Sarang Burung Walit di lokasi yang telah dikenal pasti oleh PBT'. DS23 L5 lays down an absolute prohibition of swiftlet farming in heritage areas and in heritage buildings. Again, no similar prohibition is made in relation to *kawasan jelapang padi*, *kawasan warta tali air*, or *kawasan pengairan*.

[14] From the relevant extracts submitted and referred to by both parties respectively, it cannot be said that the structure plan prohibits swiftlet farming in *kawasan jelapang padi*, *kawasan warta tali air* and/or *kawasan pengairan*. Section 22(4) of the Act does not apply.

ANY JUSTIFICATION FOR PROHIBITION WITHIN *KAWASAN JELAPANG PADI*?

[15] We have seen, from the testimonies of RW1, that swiftlet farming is not incompatible with *padi* cultivation, and that it has no adverse effect on *padi* cultivation or irrigation. Are there other reasons, though, why swiftlet farming should nevertheless be excluded from these areas (particularly *kawasan jelapang padi*), as contended by the respondent?

[16] Reference has been made to the *Garispanduan Pembangunan Industri Burung Walit Bersepadu* ('1GP') that was approved by the Cabinet in April 2009, and which has since been adopted (with modifications) in Penang. Items 4.1.2(b) and 4.2.2(b) of the 1GP (see the document marked 'I') do provide that swiftlet farming should not be permitted in 'environmentally sensitive areas' ('kawasan sensitif alam sekitar'). But, unlike in the structure plan, the 1GP does

not define the term 'kawasan sensitif alam sekitar' to mean or to include 'kawasan jelapang padi' and/or 'kawasan warta tali air'. This begs the question as to what is meant by 'kawasan sensitif alam sekitar' in the context of the 1GP. The following should be noted:

(a) the natural meaning of the term 'kawasan sensitif alam sekitar' would relate to environmental factors rather than matters concerning staple-food production (the latter, as we shall discover, is what the respondent contends). If the latter meaning is intended by the 1GP to be included in the classification concerned, then the 1GP would have stated so, or (at the least) mentioned the importation of the definition of that term from another document. In the absence of such express cross reference, there is no reason to infer any importation of definition, especially when the Penang Structure Plan is an entirely different document prepared by a different body from that which produced the 1GP. There is nothing to indicate that the framers of the 1GP had in mind the same meaning or same definition as had been intended by the draftsmen of the Penang Structure Plan;

(b) the term 'kawasan sensitif alam sekitar' is part of the phrase '… kawasan sensitif alam sekitar, kawasan tadahan air dan hutan simpanan kekal', found in the said items 4.1.2(b) and 4.2.2(b) of the 1GP. Therefore, when the term is read ejusdem generis in that context, giving it a meaning pertaining to sensitivity in terms of environmental factors is a proper construction indeed; and

(c) if, as the respondent now alleges, the refusal of planning permission was based on a supposed prohibition stipulated in the 1GP, how does one explain that there were no objections from the Department of Environment and the Veterinary Department to the KM application? Furthermore, how then does the respondent account for the approvals it had given to others in the same area?.

[17] Therefore, I do not accept the respondent's contention that the 1GP prohibits swiftlet farming in *kawasan jelapang padi* or in *kawasan warta tali air*.

[18] Nevertheless, are there other reasons (independent of the 1GP) that would support a need for such a prohibition? The respondent called Puan Zarina Ramli, *Penolong Pengarah Pertanian Bahagian Operasi* ('RW3'), to testify as to the reasons why the Department of Agriculture has objections to swiftlet farming in (particularly) *kawasan jelapang padi*, notwithstanding the fact that the Department of Agriculture was not consulted by the respondent in relation to the KM application.

[19] I found RW3 to be very passionate about *padi* farming, a trait that no doubt serves her well in her job. But, unlike RW1, she appeared to have allowed

her passion and personal preferences to cloud or diminish the logic of her answers to some of the questions asked (possibly when she feared that a straight forward and frank answer could affect the cause that she so eagerly wished to advocate). This had, unfortunately, rendered parts of her testimonies less clear, less logical, less candid, and less helpful.

[20] The gists of RW3's testimony areas follows:

(a) *kawasan jelapang padi* are the primary areas of *padi* cultivation. They are important to our country's rice supply, and to the desire of achieving total self-sufficiency level ('SSL') in the future;

(b) because of its importance, no activity other than *padi* cultivation should be permitted in *kawasan jelapang padi*. RW3 professes a rather extreme view, namely that even having a few fruit trees or a few domesticated animals in *kawasan jelapang padi* should not be allowed. As far as she is concerned, every available square inch in *kawasan jelapang padi* should be planted with *padi*; and no portion (no matter how small) should be left barren or be used for any other activity besides *padi* planting. To her, it does not matter whether or not that other activity is compatible with *padi* farming (for she said: 'to us, whether it affects or tak affect, kita memang tak akan setuju');

(c) RW3 concedes that swiftlet farming is not incompatible with *padi* cultivation. Her reason for holding the view that every other activity apart from *padi* cultivation (even if it is supplementary and only uses a tiny portion of the land) should be disallowed in *kawasan jelapang padi*, is that allowing any other activity (*presumably* one that is more lucrative, although at one stage she claimed she did not know whether swiftlet farming was lucrative) will encourage more and more padi farmers to switch from padi farming to that other activity. Then, in her view, the hope of achieving total SSL will be dashed;

(d) the *padi* yield per acre per year (in two harvests) is about four tonnes, with a value of about RM4,600. So the yield per year for (say) 5000 sqft of *padi* land is very small (about 460kg), and only worth about RM530 per year. Notwithstanding that it is *de minimis*, RW3 insists that every little 'deviation' from *padi* cultivation in *kawasan jelapang padi* would destroy the goal of SSL; and

(e) RW3 also claims that a new swiftlet house could at certain times of the day block direct sunlight from very small areas of the *padi* field immediately surrounding it. However, that would in any event not be relevant if the immediate surrounding area is not cultivated, or if the building is an existing one that has stood there for years. It will have to be judged on a case to case basis, which does not support her very insistent view that no exception at all should be made.

[21] Frequently, the trouble with a passionate but extreme position is that it only allows or wants us to choose between an absolute yes and an absolute no. It obstinately blocks out the possibility that there could be other (less extreme) options that could adequately address the legitimate concerns that gave rise to that passionately-held view in the first place. It is usually good counsel to avoid the extreme.

[22] There are indeed legitimate concerns about maximising *padi* cultivation in order to maintain and improve our current level of self-sufficiency. But the problem will not be solved by simply prohibiting *padi* farmers from all other activities, regardless of whether such activities are compatible, or if they could help the *padi* farmers in making a better living. The issues are more complex than that.

[23] Throughout the history of mankind, it is sad that manual labour has not been rewarded near as much as the profits that flow from enterprise, commerce, entrepreneurship, monetary investments, and (rightly or wrongly) positions of power and control. *Padi* farming is hard work. The rewards are nothing to shout about. That is why less and less people are willing to go into it, or to continue with that undertaking. More and more prefer to move to urban areas, to try and make a better living there. Restricting *padi* farmers to purely *padi* cultivation (to the exclusion of everything else) is not going to attract more participants. On the other hand, improving their existing income will. Therefore, how can it be objectionable to allow *padi* farmers to undertake a supplementary and secondary activity that does no harm to *padi* cultivation, takes up very little land area, and at the same time improves their income? That, if at all, will make it more attractive for one to become or to remain a *padi* farmer.

[24] The fear (expressed by RW3) that, if swiftlet farming is allowed in *kawasan jelapang padi*, farmers will one by one abandon thousands of acres of *padi* cultivation in favour of swiftlet farming is, firstly, misplaced; and, secondly, one that can be adequately addressed by the imposition of a few simple conditions.

[25] Swiftlet farming is far from limitless. Not all *padi* areas are suitable for it. In areas that have swiftlets, again their numbers are not limitless. Their numbers will depend on the availability of food for the swiftlets (which does not include *padi*, as it has been established that swiftlets do not eat *padi* or harm it in any way). Swiftlets will not multiply just because more swiftlet houses are built or provided. Nature will strike an equilibrium in relation to swiftlet population, while commerce and market forces will limit the number of viable swiftlet undertakings.

[26] Secondly, conditions may be imposed, so that *padi* cultivation will not be affected or second placed, such as in the following ways:

(a) controlling the number of swiftlet houses permitted (say, by limiting it to at most one per farm);

(b) controlling the maximum size and height of each swiftlet house (the 1GP does stipulate a maximum height of 12 metres); and

(c) imposing a condition that, when swiftlet farming is operated in a *padi* area, it can only be carried out as a supplementary activity, ie provided that *padi* cultivation continues as in the past and without diminution (less only, where necessary and permissible, that small area for the swiftlet house and its compound). Perhaps this was what RW1 had in mind when he spoke of 'integrated farming'.

[27] Hence, I find it neither necessary nor desirable to accept RW3's opinion that there ought to be an absolute prohibition of swiftlet farming in *kawasan jelapang padi*. I have not overlooked the fact that the Department of Agriculture was not consulted over the KM application in our case, and therefore that the respondent's rejection of the planning permission was not based on objections from that department or on the reasons given by RW3 in the first place. That notwithstanding, this board was interested in hearing and analysing the reasons given by RW3, because the board did not wish to simply ignore any good rationale, regardless of when it was proffered. As it turns out, however, the board is not persuaded by RW3's reasoning.

ANY JUSTIFICATION FOR PROHIBITION WITHIN *KAWASAN WARTA TALI AIR*?

[28] The respondent called Puan Wan Hasitinaziah ('RW2'), project engineer for *Rancangan Banjir Lembangan Sungei Kerian*, to testify regarding the argument for prohibition of swiftlet farming in *kawasan warta tali air*. Her testimonies may be summarised as follows:

(a) the subject lot (of the KM application) is within 'kawasan pengairan'. But she has not disputed the respondent's own documentary evidence which states that the subject lot is not in a *kawasan warta tali air* (see para 4 on p 4 of the RR). Neither has she explained what a 'kawasan pengairan' means exactly, and what may be the difference between a 'kawasan pengairan' and a *kawasan warta tali air*;

(b) like RW3, RW2 maintains that no activity apart from *padi* cultivation should be permitted in a 'kawasan pengairan'. But she has not been able to explain why, at least not in any convincing manner. In fact, she admitted (more than once) that she was not familiar with swiftlet

farming, and she did not know what its effect would be on *padi* cultivation. Yet she was steadfast in her insistence on an absolute prohibition;

(c) RW2's position is as extreme as RW3's. She insists that a *padi* farmer within a 'kawasan pengairan' should not rear any chickens, goats, cows, etc; and should not grow any fruit trees (though in a later part of her testimony she did say that one or two trees would be all right). RW2 also maintains that there must not be any exception (which, if correct, highlights once more the unsolved puzzle of the three approvals that had been granted, by the respondent, in that same area); and

(d) at one stage, RW2 seemed to suggest (rather weakly) that swiftlets' guano might find its way into the water and affect the irrigation system. But adverse effect in this respect has already been ruled out by the testimonies of RW1. At a later stage of her testimonies, RW2 changed her focus onto the effect that construction of a new swiftlet house might have on the irrigation system. The inference that we are invited to draw is that, during the period of construction, vehicles carrying construction materials would be travelling in and out of the area, and that might cause some (unspecified) damage and affect the irrigation system. Her testimony in this aspect, however, is rather imprecise.

[29] I find RW2's testimonies lacking in specifics, unsubstantiated, and unconvincing. I would add the following comments:

(a) it is indeed true that the government has provided the irrigation infrastructure within *kawasan warta tali air*, and is maintaining the same using public funds. Hence, it is reasonable for the JPS to insist that no activity should be carried out, in these areas,which would jeopardise the irrigation system. But that is precisely where the point lies — the prohibited activity must be one that would adversely affect irrigation. In the present appeal, the respondent has adduced no persuasive evidence of adverse effect to justify a prohibition of that activity. Prohibition cannot be based on JPS' preference alone, without good supporting reasons; and

(b) En Mansur submitted that 'burung walit tidak affect irrigation, tapi the process of construction of the building [the swiftlet house] will affect (irrigation)'; seeking to persuade the board to uphold the refusal of planning permissionon this ground. There are two problems with this argument, as far as the present appeal is concerned. Firstly, in this case we are dealing with an existing building that has stood there for many years. No new building needs to be constructed. Therefore, that argument (even assuming that it may apply in some other cases) cannot apply to our present case. Secondly, there is no clear and tangible evidence as to how the process of construction would affect the irrigation system in a

material way (bearing in mind that the construction process is a one-off occurrence that spans only a short period of time).

THE RIGHT TO EQUAL TREATMENT IN SIMILAR CIRCUMSTANCES

[30] There is another matter that had greatly troubled the board right from the beginning. It is an admitted fact that at least three approvals had been granted (by the same respondent) for similar planning applications in the same area, and at about the same period of time. The appellant therefore complains that he has been unequally treated. This is a powerful argument. Applicants for the same kind of planning permissions in the same area must, in the absence of valid distinguishing factors, be treated equally by the planning authority. That this must be so is, to me, plain and obvious.

[31] If authorities for that proposition need at all to be cited, it will suffice to refer to the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 at p 55; [1999] 3 CLJ 65 at p 113, which was referred to by learned counsel for the appellant. The Federal Court in that case had ruled that it would be an unreasonable exercise of discretion if a discretion is exercised in a way that infringes the 'principles governing the exercise of power in a constitutional democracy', including 'the principle of equality (which requires decisions to be consistently applied and prohibits the making of unjustifiable distinctions between individuals)'.

[32] This board does not condone unequal treatment; a principle with which En Mansur in his usual candidness agrees. If sufficient evidence had been adduced at the hearing that swiftlet farming ought to be prohibited in *kawasan jelapang padi* or *kawasan warta tali air*, and that this appeal ought to be dismissed, then the board would also have to look into the earlier approvals bearing similar circumstances, to see if at law it might be proper to direct the respondent to review or revoke the same, so as to ensure equal treatment. Thankfully, that journey proved unnecessary to be embarked upon, since the board is not persuaded that swiftlet farming ought to be absolutely prohibited in areas of *padi* cultivation.

OTHER MATTERS

[33] The respondent pointed out that the appellant had commenced his activity without prior planning permission. That is obviously something that can invite its own consequences or penalties under the Act. But it does not

prevent an applicant from seeking to regularise his undertaking by applying for the required planning permission. Whether or not planning permission ought to be granted would be determined by carefully considering all relevant planning matters in relation to the facts and circumstances of a particular case. An applicant's breach (in operating before obtaining permission) will not per se disqualify him from applying for and (where appropriate) obtaining a planning permission; although there may be cases where the fact of that breach could properly become one of the factors to be taken into consideration by the planning authority when deciding on the application.

[34] As for the two cases cited by the respondent, I must, after perusing them, agree with the appellant's counsel that they do not contain any statement of principle that is relevant to the issues in the present appeal.

THE CONCLUSION

[35] The board allows this appeal, and directs the respondent to grant the relevant planning permission to the appellant, subject to the usual conditions that the respondent would impose in similar approvals, and further with the following additional conditions:

(a) the height of the building (swiftlet house) must not exceed 12 metres;

(b) the combined ground area of the building and its compound that is used for (or in relation to) swiftlet farming must not exceed 10,000 sqft, or 5% of the total land area of the appellant's farm, whichever is the lesser;

(c) the use of 'bird calls' will be restricted to the hours of 7–10 am in the morning, and the hours of 5–8pm in the evening;

(d) no area of the appellant's farm that is currently under *padi* cultivation should cease to be so cultivated by reason of the swiftlet farming (or its related activities) carried out by the appellant;

(e) the appellant (and his co-owners) will only be allowed one planning permission in relation to his/their farm (irrespective of whether his/their farm is situated on one or more land titles);

(f) the planning permission may be revoked if the appellant shall breach any of its conditions and, if the breach is capable of remedy, shall fail to promptly remedy the same;

(g) the planning permission granted shall be subject to future review, if there shall be sufficient evidence in the future (produced to the satisfaction of the board) showing that swiftlet farming produces harmful effect on *padi* cultivation or on its irrigation system; and

(h) all parties shall be at liberty to apply (including in respect of the interpretation or execution of these orders of the board).

[36] This is the unanimous decision of the board.

Appeal allowed and respondent directed to grant relevant planning permission to appellant.

Reported by Kanesh Sundrum